IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1534

MICHAEL R. McMAHON - - - - Petitioner

versus

KENTUCKY BAR ASSOCIATION - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY AND APPENDIX

BURTON MILWARD, JR.
319 Kentucky Home Life Building
Louisville, Kentucky 40202
Counsel for Petitioner

April 9, 1979

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

INDEX

CITATIONS

Cases:

Statutes:

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v.

KENTUCKY BAR ASSOCIATION - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

The Petitioner, MICHAEL R. McMAHON, respectfully prays that a Writ of Certiorari issue to review the Opinion and Order of the Supreme Court of Kentucky, rendered in this proceeding on November 21, 1978.

OPINIONS BELOW

The Opinion of the Supreme Court of Kentucky rendered on November 21, 1978 (Appendix A) is reported at *Kentucky Bar Association* v. *McMahon*, Ky., 575 S. W. 2d 453 (1978). A Petition for Rehearing was filed and was denied on January 16, 1979 (Appendix B).

Upon motion of the Petitioner, the Supreme Court of Kentucky entered an Order Granting Stay of Ex-

ecution and Enforcement of the Mandate on January 31, 1979 (Appendix C), staying enforcement of the Mandate until May 1, 1979. [NOTE: Petitioner files with this Petition a motion requesting the United States Supreme Court further to enter an Order staying enforcement of the Kentucky mandate pending final disposition of this Certiorari proceeding.]

JURISDICTION

The Opinion of the Supreme Court of Kentucky (Appendix A) was entered on November 21, 1978; and a timely Petition for Rehearing was denied by Mandate and Order of the Supreme Court of Kentucky (Appendix B) on January 16, 1979, and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, consistent with principles of due process, Petitioner should not have been punished by suspension from the practice of law where the neglect for which he has been punished occurred as a result of his suffering from the medical disease of alcoholism rather than from any form of moral transgression, where he voluntarily made restitution to the client, where he has stabilized his alcoholic condition and demonstrated fitness to continue in the practice of law, and where the punishment imposed serves no purpose.

2. Whether the Petitioner's suspension from the practice of law amounted to cruel and unusual punishment where the suspension was based on neglect caused by the medical disease of alcoholism rather than from any form of moral transgression.

3. Whether the Petitioner's suspension from the practice of law amounted to cruel and unusual punishment where supervised probation, not suspension, is the appropriate remedy for a recovered alcoholic who has, since the time of the neglect involved, demonstrated his fitness to continue in the practice of the law.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

The Eighth Amendment to the United States Constitution provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

The Kentucky Bar Association charged Petitioner with three counts of professional misconduct which it considered brought the bench and bar into disrepute. Petitioner was charged with: (1) falsely advising a client as to the status of litigation; (2) loaning a contingency fee client $200 on three occasions; and (3)

paying the client money from an "escrow account." (Appendix D). These three charges arose from Petitioner's handling of a single case for a single client.

Petitioner responded to the charges admitting the allegations except for the allegation that he had falsely advised the client. (Appendix E).

The Bar Association's fact-finding body, the Trial Committee, heard evidence on both sides and found that none of the charges had much merit.

> Charge Number One concerning the veracity of statements by the respondent to Mary C. Phillips, is not proven.
>
> Charge Number Three regarding the payment of monies from an escrow account, is of no merit.
>
> Charge Number Two concerning loans to a contingency fee client, is specious.
>
> [Report of Trial Committee: Appendix F, pp. A-12–A-13.]

The Trial Committee recommended that charges one and three be "taken for naught" and that charge two warranted a "private reprimand."

> It is the recommendation of this Trial Committee that Charge Numbers One and Three be taken for naught; and that Charge Number Two be subjected to a "private" reprimand for the sole reason that the rule is in existence. [Report of Trial Committee: Appendix F, p. A-13.]

The Trial Committee reached its conclusions and made its recommendations based on the following facts:

1.

Mary C. Phillips had previously been in a series of automobile accidents; and had suffered back

pain as early as 1969, for which she wore a back brace for an extended period of time. She continued to have pain in the cervical area, through 1973. Mrs. Phillips' most recent automobile accidents before the one in question were on December 13, 1973, and December 15, 1973.

2.

Respondent, Michael R. McMahon, entered into a contingent fee contract dated August 24, 1974, for the representation of Mary C. Phillips in her claim for personal injuries growing out of an automobile accident on January 29, 1974 (the official accident report relative to the automobile accident bears the date of January 31, 1974).

3.

On August 7, 1974, Mary C. Phillips was admitted at St. Anthony's Hospital, Louisville, Kentucky for a surgical operation.

4.

Mary C. Phillips, in addition to her physical complaints, was undergoing extreme emotional hardship, due to poor financial circumstances and the responsibility of supporting infant children in a broken home.

5.

The respondent herein failed to file a tort action to recover damages for Mary C. Phillips within the one-year time prescribed by law.

6.

The respondent advised Mary C. Phillips of his failure to file the action, and further advised her that his interests were adverse to her, and that she should consult other counsel.

7.

Respondent paid Mary C. Phillips the sum of $4,322.50, in addition to approximately $600.00 in loans.

8.

No release was taken from Mary C. Phillips by the respondent upon payment of the sums of money.

9.

The $200.00 loans, on each of three occasions, were made for the purpose of alleviating Mrs. Phillips' financial hardships, not the least of which was caused by her inability to have funds to pay for a "sewer tap" to her home.

10.

The $4,322.50 paid by the respondent to Mary C. Phillips (not including some $600.00 in loans to her) constituted the reasonable value of her case. Mrs. Phillips' tort claim was "questionable" both because of her previous injury and the apparent light nature of her accident.

11.

The respondent suffers from alcoholism. The respondent's alcoholic condition is presently stabilized. Alcoholism is an affliction for which there is no known cure. However, stabilization can be effectuated by various processes which will enable the patient to adequately negotiate life.
[Report of Trial Committee: Appendix F, pp. A-11–A-12.]

The Trial Committee heard evidence from five witnesses.

Mrs. Mary Phillips testified that she retained Petitioner to represent her in a personal injury case, on

a contingency basis, and that Petitioner did not file suit on her behalf within the statutory time. [Transcript, hereinafter referred to as T., pp. 8-9, 27, 43.] She testified that Petitioner loaned her $200 on three occasions to help her meet various personal obligations. [T., pp. 13-15.] She further testified that, on October 23, 1976, Petitioner came to her home and presented her with a check on his escrow account for $4,321.50. [T., pp. 15-16, 27-28.] This was the approximate probable recovery amount on her personal injury suit which Petitioner had neglected to file.

Mr. Peter Manning, an attorney, testified that he had shared office space with Petitioner during the time that Petitioner had "represented" Mrs. Phillips. [T., p. 49.] Manning testified that, during that time, Petitioner suffered from the disease of alcoholism.

> Mike had a severe drinking problem. . . . He would come in the office sporadically. He would miss appointments. He would miss court dates. He was sick; he was an alcoholic. [T., p. 50.]

Manning testified that, in his opinion, Petitioner neglected to file Mrs. Phillips' suit and prepare the case "excellently" solely because of alcoholism.

> I think if he weren't drinking, he would have prepared the case excellently and done what he is able to do when he is not drinking. [T., p. 53.]
>
> Q. 168. Do you think . . . that his neglect is solely because of being an alcoholic?
>
> A. Yes, sir. [T., p. 54.]

Manning further testified that since the time Petitioner neglected Mrs. Phillips' personal injury action, Petitioner had joined Alcoholics Anonymous and arrested his alcoholism.

> When we moved into the new office, Mike's practice was kept in well order. His cases are prepared, to the best of my knowledge. I know he joined AA . . . . [T., p. 51.]

Manning testified that at the time of the hearing, Petitioner had overcome the disease of alcoholism and is the "excellent lawyer" he is capable of being.

> He is an excellent lawyer. I would put Mr. McMahon against any lawyer I know or come in contact with. He is one of the smartest people I know. He can prepare a case as well as anybody that I know, and he is a fine lawyer. [T., p. 52.]

Mr. Forrest L. Yocum, an Alcoholics Anonymous counselor, testified the Petitioner has been active in AA for several years and has stopped drinking.

> I'm not sure just how long Mike has been without alcohol, but I know it's better than a year. He has been a fine person to me. He is active in AA. And being active, I mean he is there for more than himself. He is trying to help other people, too. This is what we call an active AA. He is working with other people, taking an active part in the group. [T., p. 62.]

Yocum testified that a person afflicted with alcoholism often neglects business transactions.

> Q. 209. And you admit that a person addicted to alcohol often is not competent to handle business transactions, do you not?
>
> A. While under the influence of alcohol, practicing alcoholic, I would say that would be correct. [T., p. 66.]

Yocum testified that, in his opinion, Petitioner would remain sober and would not be crippled by alcoholism in the future.

> Q. 207. In your association with Michael in the various AA meetings, and of your personal knowledge, would you expect Mike, now that he has been on the wagon for a year or so, to stay sober?
>
> A. I do. I expect Mike to stay sober. He is an active member of AA. I don't figure any problems out of him. [T., p. 65.]

Dr. S. Stanton Baker, a physician with extensive experience treating alcoholics, testified that he had consulted with Petitioner regarding Petitioner's alcoholism. [Baker Deposition, p. 3.] He testified that he was familiar with Petitioner's neglect in handling Mrs. Phillips' personal injury case, and that such neglect would not be unusual for a person suffering from alcoholism.

> Q. 13. Did he give you any details in terms of that he is charged with neglecting a client's business in failing to file a lawsuit within the prescribed time?
>
> A. Yes, sir, he did.
>
> Q. 14. Would this be an unusual situation for

> a person who is a drinking alcoholic, to neglect business in this manner?
>
> A. No, sir, I don't think it would be unusual at all. [Baker Deposition, p. 6.]

Dr. Baker further testified that alcoholism is different from drunkenness, that alcoholism is a recognized illness like diabetes or cancer or pneumonia.

> And I would like to emphasize that contrary to what is commonly felt about alcoholism, this is an entirely different matter from drinking, or drunkards, or anything of that sort. It is an illness, and it was declared an illness in 1955 by the American Psychiatric Association and in '56 by the American Medical Association. And it has all of the qualities and requirements for a disease entity that any other disease has. It is no different as a disease than diabetes or cancer or pneumonia or whatever, other illness that the human body might be afflicted with. [Baker Deposition, pp. 16-17.]

Mr. Harry Hargadon, Jr., a well-known attorney specializing in personal injury cases, testified that Mrs. Phillips' personal injury suit which Petitioner failed to file had a probable range of "four to six thousand dollars."

> The case has a value, a range value . . . from my standpoint, that of the plaintiff's trial attorney, of four to six thousand dollars. [Hargadon Deposition, p. 8.]

Based on the evidence presented to it, the Trial Committee of the Kentucky Bar Association recommended

that two counts "be taken for naught" and recommended only "a private reprimand" on the third count. [Report of Trial Committee: Appendix F, p. A-13.]

The Board of Governors of the Kentucky Bar Association, however, reviewed the record of the same evidence and found the Petitioner guilty of all three counts, and entered the following Conclusions of Law, Opinion and Order:

> 1. Respondent did falsely advise his client as to the status of her litigation and this was not denied by testimony.
>
> 2. Respondent loaned Mary C. Phillips $200.00 on each of three occasions to be paid back out of the contingency fee.
>
> 3. Respondent paid Mary C. Phillips money from an escrow account not belonging to Mrs. Phillips and did not advise her that her case had been settled.
>
> 4. This conduct was such conduct that could be and was calculated to bring the bench and bar into disrepute.
>
> [Board of Governors' Opinion: Appendix G, p. A-18.]

The Board of Governors frankly stated that Petitioner's alcoholism "brought about his neglect to perform his duty to his client," and that Petitioner had "taken steps to alleviate this problem."

> 5. Respondent did have a drinking problem at the time of this transaction and was considered as a mitigating factor in that it brought about his neglect to perform his duty to his client and the

> fact that he has taken steps to alleviate this problem is a step in the right direction and if such conduct continues should be considered if and when Respondent files for reinstatement. [Board of Governors' Opinion: Appendix G, p. A-18.]

Nevertheless, the Board of Governors recommended that Petitioner "be suspended from the practice of law" for a period of one year.

> 6. The Board concludes that the Respondent has been found guilty as charged and recommends that Respondent, Michael R. McMahon, be suspended from the practice of law in the State of Kentucky for a period of one year. [Board of Governors' Opinion: Appendix G, p. A-18.]

Even though the Board of Governors found that Petitioner's neglect had been caused by alcoholism and that Petitioner had now overcome this alcoholism, the Board of Governors did not recommend probation of the one-year suspension.

The Supreme Court of Kentucky approved the one-year suspension recommended by the Board of Governors.

> The recommendation of the Kentucky State Bar Association is approved and McMahon is suspended from the practice of law in this state for a period of one year. [Opinion: Appendix A, p. A-4.]

Petitioner's Petition for Rehearing was denied and the Mandate issued. [Appendix B, p. A-5.]

This Petition for a Writ of Certiorari is Petitioner's only appeal.

REASONS FOR GRANTING THE WRIT

First Question: Due Process Prevents Punishment for Neglect Resulting From Medical Disease Rather Than From Moral Transgression, Where the Punishment Serves No Purpose.

1. The actual, practical effect of the decision of the Supreme Court of Kentucky is that it means that attorneys practicing in Kentucky may be suspended or disbarred from their very livelihood for neglect resulting from medical disease, wholly irrespective of considerations of moral transgression.

2. In this country, alcoholism is recognized as a disease.

> [A]lcoholism is an illness requiring treatment and rehabilitation. . . . [Title 42 U.S.C. §4541, Alcohol Abuse and Alcoholism, Congressional Findings and Declaration of Purpose.]
>
> "Alcoholism" means a medically diagnosable disease characterized by chronic, habitual or periodic consumption of alcoholic beverages resulting in the (a) substantial interference with an individual's social or economic functions in the community, or (b) the loss of powers of self-control with respect to the use of such beverages. [Kentucky Revised Statutes, §222.011, Alcohol and Drug Education, Treatment, and Rehabilitation, Definitions.]

3. There can be no doubt that the disease of alcoholism has the raw power to cause an individual to neglect interpersonal relations and social and economic

functioning, such as the performance of an attorney's duties.

> The National Council on Alcoholism has defined "alcoholic" as "a person who is powerless to stop drinking and whose drinking seriously alters his normal living pattern." The American Medical Association has defined alcoholics as "those excessive drinkers whose dependence on alcohol has attained such a degree that it shows a noticeable disturbance or interference with their bodily or mental health, their interpersonal relations, and their satisfactory social and economic functioning." *Powell* v. *Texas,* 392 U. S. 514, 560 n. 3 (1968).

4. In the present case, the record unequivocally demonstrates that the neglect here involved was caused by Petitioner's suffering from the disease of alcoholism.

> McMahon's drinking problem . . . brought about McMahon's neglect to perform his duty to his client. [Opinion: Appendix A, p. A-3.]
>
> Respondent did have a drinking problem at the time of this transaction and . . . it brought about his neglect to perform his duty to his client. . . . [Board of Governors' Opinion: Appendix G, p. A-18.]
>
> The Respondent suffers from alcoholism. The respondent's alcoholic condition is presently stabilized. [Report of Trial Committee: Appendix F, p. A-12.]

5. The decision of the Supreme Court of Kentucky found that alcoholism "brought about McMahon's neglect," but then *punished* Petitioner for having suffered

from the illness and its natural consequences. The decision of the Supreme Court of Kentucky deprived Petitioner of his very livelihood and right to practice law based on its own holding that Petitioner had suffered from a disease which caused neglect!

6. Disbarment is a punishment or penalty imposed upon a lawyer in proceedings of a quasi-criminal nature.

> Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. . . . These are adversary proceedings of a quasi-criminal nature. *In the Matter of John Ruffalo, Jr.,* 390 U. S. 544, 550-551 (1968).

An attorney should not be prevented from practicing law except for valid reasons.

> [A] person cannot be prevented from practicing except for valid reasons. *Schware* v. *Board of Bar Examiners,* 353 U. S. 232, 239, n. 5 (1957).

In the present case, it is respectfully submitted that the disputed decision, in depriving Petitioner of his livelihood and suspending him from the practice of law for neglect caused by a recognized disease, has not imposed a punishment for *a valid reason* as required by due process.

7. Petitioner's neglect was caused by illness and not by moral transgression or conscious wrongdoing. As such, it violates principles of due process to *punish* Petitioner for negligent conduct which was a product of illness.

> [A]lcoholism is caused and maintained by something other than the moral fault of the alcoholic, something that, to a greater or lesser extent depending upon the physiological or psychological makeup and history of the individual, cannot be controlled by him. *Powell* v. *Texas,* 392 U. S. 514, 561 (1968), dissenting opinion.

In the present case, Petitioner's neglect originated in illness. Petitioner had no control over his neglect, and he should not be punished therefor.

8. The record demonstrates, as set forth in the Statement of Facts of this Petition, that *as Petitioner began to recover from the illness of alcoholism, he immediately acted to correct his neglect. He admitted his neglect to the client. He restored the client to wholeness by paying to her the reasonable value of her case. He stabilized his alcoholic condition* and has arrested his alcoholism so that it no longer bears on his practice of law. [Report of Trial Committee, Findings of Fact: Appendix F, p. A-12.]

9. The consequences of allowing the disputed decision to govern other similar situations are devastating. The record in this proceeding repeatedly demonstrates that Petitioner's neglect was caused by illness from which Petitioner has now recovered. The record shows that, as the illness subsided, Petitioner took every available step to correct his neglect. Even under such circumstances, the disputed decision now looms as a towering threat that illness will be punished and subsequent steps to correct neglect have no value. The disputed decision is fundamentally unfair because it has no purpose in its *punishment.*

10. This Court is in a proper position to reassure attorneys and other professionals that due process protections yet guard against punishment for illness and punishment which serves no purpose.

Second Question: It Is Cruel and Unusual to Suspend Petitioner From the Practice of Law for Neglect Where the Neglect Was Caused by Disease.

1. The actual, practical effect of the decision of the Supreme Court of Kentucky is to permit punishment for having suffered a recognized illness, including the effects of that illness, so that such punishment amounts to cruel and unusual punishment.

2. Alcoholism is a recognized illness. Title 42 U.S.C. §4541, Alcohol Abuse and Alcoholism, Congressional Findings and Declaration of Purpose, quoted *supra;* Kentucky Revised Statutes §222.011(2)(3), Definitions, quoted *supra.*

3. The Opinion candidly observes that alcoholism "brought about McMahon's neglect to perform his duty to his client." [Opinion: Appendix A, p. A-3.]

4. The Justices of this Court, principally in minority opinions, have shown a willingness to boldly speak out what we all feel: that it is against our evolving values of morality to punish people for being sick.

Justices Fortas, Douglas, Brennan and Stewart boldly spoke our feelings when they reminded:

> We would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for

> being sick. This age of enlightenment cannot tolerate such barbarous action. *Powell* v. *Texas,* 392 U. S. 514, 566, n. 28 (1968), dissenting opinion.

Mr. Justice Fortas boldly spoke our feelings when he stated:

> [P]unishment of alcoholics does society no good. It can be applauded only by the uninformed or the sadistic. It is neither a deterrent nor a cure for those afflicted. On the contrary, as testified here, it is not only ineffective, but "particularly antitherapeutic because it increases the feelings of worthlessness that all alcoholics have . . . ." *Budd* v. *California,* 385 U. S. 909 (1966), Certiorari denied, dissenting opinion.

In the present case, the punishment imposed by the disputed decision does society no good. Petitioner has already stabilized the alcoholism that gave birth to his neglect. He has voluntarily restored the neglected client to wholeness.

To suspend the Petitioner from the practice of law, under these facts, is a barbarous action. It is decidedly antitherapeutic. It benefits no one.

5. In *Furman* v. *Georgia,* this Court stated that the cruel and unusual language of the Constitution "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Furman* v. *Georgia,* 408 U. S. 238, 329 (1972). In the present case, a quasi-criminal proceeding, *In the Matter of John Ruffalo, Jr.,* 390 U. S. 544, 551 (1968), the disputed decision has ignored "evolving standards of decency" and has punished Petitioner for his illness

and the natural consequences thereof, in violation of the constitutional protection against cruel and unusual punishment.

6. The consequences of allowing the disputed decision to govern other similar situations are devastating. The disputed decision threatens punishment for illness. The disputed decision mercilessly ignores an ill person's steps, upon recovery, to correct the consequences of his neglect. It is respectfully submitted that such a decision militates against "evolving standards of decency" and should be reversed.

Third Question: It Is Cruel and Unusual to Suspend Petitioner From the Practice of Law Where Supervised Probation, Not Suspension, Is the Appropriate Remedy for a Recovered Alcoholic Who Has, Since the Time of the Neglect Charged, Arrested the Cause of Neglect and Demonstrated His Fitness to Continue in the Practice of Law.

1. The actual, practical effect of the decision of the Supreme Court of Kentucky is to impose the cruel and unusual punishment of suspension upon Petitioner even after Petitioner has overcome the alcoholism that caused the neglect for which punishment was imposed. The punishment is cruel and unusual because it takes away a man's livelihood without regard for the unique circumstances surrounding neglect born of alcoholism, and subsequent recovery.

2. The punishment is cruel and unusual because it is out of step with "evolving standards of decency." The following cases, involving lawyer discipline and the

unique circumstances surrounding professional neglect born of alcoholism, and subsequent recovery, reflect "evolving standards of decency." These cases demonstrate that strict probation for the lawyer is the usual and reasoned approach in such cases, not the wresting away of an ill or recovered lawyer's entire livelihood.

The Supreme Court of Oregon found that strict probation, not actual suspension, would "serve both as an incentive to the accused to continue his efforts at rehabilitation and as an adequate measure to protect the public." *In re Lewelling,* Ore., 417 P. 2d 1019, 1020 (1966). In *Lewelling,* the court found, as in our case, that the accused had ceased to use intoxicating liquor and had pledged not to use it in the future. The court ordered a two-year suspension, to be withheld upon compliance with the conditions of a five-year probation.

> The Board recommends that accused be subjected to the sanction of a two-year suspension from the practice of law, the sanction to be imposed only if the accused fails, during a period of five years, to fulfill the following conditions: (1) That he refrain entirely from the use of alcoholic beverages and (2) that he discontinue the delay and neglect which characterized his professional conduct in the past and which brought upon him the charges in this proceeding. *Id.,* 417 P. 2d at 1020.

In the present case, Petitioner should likewise be strictly probated both as an incentive to recovery from illness and as an adequate measure to protect the public.

The Supreme Court of California found that strict probation, not actual suspension, would be the appropriate sanction. In *Tenner* v. *State Bar,* Calif., 576 P. 2d 92 (1978), the court observed that "alcoholism and the pressure of financial and emotional problems adversely affected [the attorney] during the period of misconduct," but that the attorney could "redeem himself" if permitted to continue practicing under a probationary suspension. The court ordered a three-year period of probation and approved strict conditions that the attorney:

> (1) effect restitution, (2) obtain psychiatric help, (3) abstain from intoxicants, (4) enroll in the program of the State Bar Committee on Alcohol Abuse, and (5) submit quarterly written reports of compliance with the terms of probation, State Bar Act, and Rules of Professional Conduct. *Id.,* 576 P. 2d at 92.

In the present case, Petitioner should likewise be strictly probated both to allow him to "redeem himself" and as adequate protection for the public.

The Supreme Court of Florida found that strict probation, not actual suspension, would be the appropriate sanction. In *Florida Bar* v. *Budzinski,* Fla., 322 So. 2d 511 (1975), the court probated the attorney for three years, ordered restitution, and detailed the following conditions of probation.

> A. The Respondent will not commit any crimes or violate the Integration Rule or Code of Professional Responsibility.
>
> B. The Respondent will not consume any alcoholic beverage unless prescribed by a physician.

C. The Respondent will file quarterly reports directly with the Clerk of the Florida Supreme Court with a copy to Staff Counsel for The Florida Bar. In preparing such reports, Respondent shall include the following minimum information: 1) A report from his personal physician indicating his progress in treating his alcoholism. 2) A caseload report listing every matter which has been pending in the Respondent's office during the preceding quarter. The name of every client and brief description of the subject matter shall be included along with a statement about whether the case is not current, current, or disposed of. If the case is pending before a court, the court and case number shall be included in the report.

D. During the period of probation, the Respondent consents, with one working day's notice, to an inspection of his case files and trust account records by a member of The Florida Bar designated by the Staff Counsel for The Florida Bar. The confidentiality of those files shall be maintained.

E. BREACH OF PROBATION AND REVIEW BY THE FLORIDA SUPREME COURT. The Respondent agrees that his breach of the conditions of his probation may be determined by the filing with the Supreme Court of a grievance committee report approved by the Board of Governors, finding probable cause of the breach. The Board of Governors may make a recommendation of discipline when such a report is filed.
Id., 322 So. 2d at 514.

In the present case, Petitioner should likewise be strictly probated instead of having his livelihood taken

from him. This Petitioner has already voluntarily made restitution; he has arrested the illness that overcame him and caused his neglect. The punishment of suspension is cruel and it is unusual. Cf., *Florida Bar* v. *Taylor,* Fla., 167 So. 2d 729 (1964), in which the Supreme Court of Florida ordered supervised probation for the attorney.

> The conditions of the probation shall be that the respondent conduct himself in an ethical and professional manner and refrain from excessive use of intoxicants during the probationary period. *Id.,* 167 So. 2d at 730.

In the present case, Petitioner should likewise be strictly probated.

The Supreme Court of Minnesota, in *In re Nordstrom.,* Minn., 264 N. W. 2d 629 (1978), explicitly recognized that the recovered alcoholic's "prospects of succeeding have greater promise if he is highly motivated and closely supervised." *Id.,* 264 N. W. 2d at 631. *This is exactly the point of this Petition:* that it violates constitutional guarantees of due process and protections against cruel and unusual punishment to punish for neglect caused by the *illness* of alcoholism. Where the attorney has recovered from the illness, "evolving standards of decency" require probation, not suspension, as an appropriate sanction. In *Nordstrom,* the Supreme Court of Minnesota deferred final disposition of the case for a year, set conditions to be met, and offered to continue probation if the conditions had been met.

> Accordingly, we defer final disposition of the matter for one year. If during that period respondent has totally abstained from the use of alcohol, has applied himself diligently to his practice, has begun restitution in a methodical manner as directed by the Lawyers Professional Responsibility Board, and has, in all other respects, complied with the terms of his stipulation and with such other directives as the board may prescribe, the court will permit respondent to continue the practice of law for an appropriate probationary period. However, any violations of the terms of his probation brought to the court's attention in the future will be grounds for immediate suspension or disbarment. *Id.,* 264 N. W. 2d at 631.

In the present case, strict conditions should also be outlined and close supervision imposed, but suspension which terminates Petitioner's livelihood is out of place. Suspension is cruel; it is unusual.

The case of *In re Walker,* S. Dak. 254 N. W. 2d 452 (1977), is a case in point. In *Walker,* the Supreme Court of South Dakota observed that the

> misconduct found against respondent was proximately caused by his alcoholism and occurred primarily prior to the beginning of his total abstention. . . . *Id.,* 254 N. W. 2d at 457.

In the present case, the misconduct found against Petitioner also was proximately caused by his alcoholism and also occurred primarily prior to the beginning of his total abstention.

The Supreme Court of South Dakota, on facts identical to the present proceeding, held it proper that the

attorney "be given an opportunity to continue the practice of law conditional upon his continued abstinence from alcohol. . . ." *Id.,* 254 N. W. 2d at 457. The court ordered a two-year suspension, to be imposed only if the attorney failed to fulfill two conditions:

> (1) That for a period of five years from the date hereof he continued to refrain entirely from the use of alcoholic beverages; and
>
> (2) That for a like period he not commit any act that would constitute a violation of the code of professional responsibility that would constitute grounds for the imposition of discipline pursuant to SDCL 16-19.

Id., 254 N. W. 2d at 457.

The court noted that it had extended probation to the attorney not because he was an admitted alcoholic, but rather because he was a "bona fide recovered" alcoholic now fit "to continue in the practice of law."

> The respondent did not receive the consideration that we have given him because he is an admitted alcoholic but rather because he is, in our view, a bona fide recovered or arrested alcoholic who has for the past two and one-half years demonstrated his fitness to continue in the practice of law. *Id.,* 254 N. W. 2d at 457.

The present Petitioner likewise is a bona fide recovered or arrested alcoholic who has for the past two and one-half years demonstrated his fitness to continue in the practice of law. Precisely under these circumstances, it is respectfully submitted that 1) the suspension

which now cuts Petitioner entirely away from the practice of law is cruel and unusual and 2) strict probation with close supervision is the appropriate remedy in the present case.

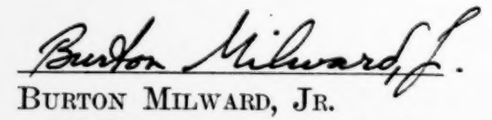
3. The usual sanction for an attorney's neglect caused by alcoholism, where the attorney has subsequently recovered from and arrested the illness and demonstrated his fitness to continue in the practice of the law, is strict probation and close supervision. The disputed decision imposes cruel and unusual suspension. The disputed decision is wrong; it should be reversed, and probation ordered.

4. The consequences of allowing the disputed decision to govern other similar situations is that the very livelihood of other attorneys can be taken away from them—without hope for probation—even where they have 1) recovered from the illness of alcoholism, 2) voluntarily made full restitution for neglect caused by illness, and 3) demonstrated fitness to continue in the practice of law! Such a decision is at odds with "evolving standards of decency" that define the protection against cruel and unusual punishment. The excessive and unfair order of suspension should be reversed.

CONCLUSION

For these reasons, it is respectfully submitted that a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Kentucky.

Respectfully submitted,



BURTON MILWARD, JR.
319 Kentucky Home Life Building
Louisville, Kentucky 40202

Counsel for Petitioner

APPENDIX

APPENDIX A

RENDERED: NOVEMBER 21, 1978

SUPREME COURT OF KENTUCKY

File No. 78-SC-455-KB

KENTUCKY BAR ASSOCIATION - - - *Complainant*

v

MICHAEL R. McMAHON - - - - *Respondent*

PER CURIAM

This is a disciplinary proceeding in which the Kentucky Bar Association charged McMahon with three counts of unprofessional conduct calculated to bring the bench and bar into disrepute. McMahon was charged with: (1) falsely advising a client as to the status of litigation; (2) loaning a contingency fee client $200.00 on three occasions; and (3) paying the client money from an "attorney at law escrow account."

Counsel for McMahon filed a response admitting the allegations contained in the charges except any allegations as to the falsity of representations made by him to his client.[1]

A trial committee appointed by the Board of Governors of the association heard evidence on both sides and found: "Charge number one concerning the veracity of statements by [McMahon] to [his client] is not proven; charge number three regarding payment of monies from an escrow

[1]Counsel for McMahon before the trial committee is not the same attorney who represents him on review.

account is of no merit; charge number two concerning loans to a contingency fee client is specious." The trial committee recommended that charges one and three "be taken for naught and that charge number two be subjected to a "private" reprimand for the sole reason that the rule is in existence."[2]

McMahon did not fare as well with the Board of Governors. The members discussed each charge separately and the evidence offered in support of and against the charges and found: (1) that McMahon entered into a contingency fee contract with the client in March 1974, "however the contract was not signed until August 24, 1974." The Board also found that McMahon loaned his client $200.00 on each of three occasions and that the client testified she "considered it a loan" to be paid back when the case was settled. The Board found also that in the latter part of 1974 and the early part of 1975, the client contacted McMahon concerning her case on several occasions and McMahon's stock answer was "that he was working on the case." In 1976, the client through a Mr. Huff learned that McMahon had failed to file a suit in her behalf. On October 23, 1976, McMahon presented the client a check in the amount of $4,321.50 drawn on his attorney at law escrow account. There was no evidence that a settlement had been made. McMahon told the client he had a conflict of interest and "that she should get her a lawyer."

The Board of Governors found McMahon guilty of professional misconduct and recommended that he be suspended from the practice of law in the state of Kentucky for a period of one year.

McMahon, in his notice for review and brief, makes a feeble attempt to convince this court that the evidence fails to sustain the findings of the Board of Governors. He admits quite frankly, that if he is unable to prevail in that

[2]McMahon did not testify.

endeavor then the punishment recommended by the Board of Governors is too severe because a drinking problem was the cause of the neglect to properly handle his client's business.

This court has read the evidence and is of the view that it was more than sufficient to sustain the Board's finding. The Board considered McMahon's drinking problem. It considered also that problem a mitigating factor, in that it brought about McMahon's neglect to perform his duty to his client. In its conclusions the Board commended McMahon for the action he has taken to alleviate the drinking problem as "a step in the right direction and if such conduct continues should be considered if and when respondent [McMahon] files for reinstatement."

The practice of law is an honorable profession. "Its first demand is a meet and lively responsibility without which it could not survive as a profession. If a respondent does not possess it he belongs in some other line of work."[3]

In the past two years this court has reviewed a number of disciplinary proceedings in which lawyers failed to protect the interest of their respective clients. Without exception, each was suspended from the practice of law for a term commensurate with his degree of neglect.[4]

[3]Kentucky Bar Association v. Booth, Ky., 444 S. W. 2d 123 (1969).

[4]Kentucky Bar Association v. Vincent, Ky., 538 S. W. 2d 39 (1976);
Kentucky Bar Association v. Dillman, Ky., 539 S. W. 2d 294 (1976);
Kentucky Bar Association v. Murphy, Ky., 549 S. W. 2d 295 (1976);
Kentucky Bar Association v. Clem, Ky., 554 S. W. 2d 360 (1977);
Kentucky Bar Association v. Dillman, Ky., 554 S. W. 2d 362 (1977);
Kentucky Bar Association v. Martin, Ky., 558 S. W. 2d 173 (1977);

(Footnote continued on following page)

The recommendation of the Kentucky State Bar Association is approved and McMahon is suspended from the practice of law in this state for a period of one year. The Kentucky State Bar Association shall recover its costs as provided by SCR 3.450.

All concur.

Attorneys for Complainant:

LESLIE G. WHITMER, Director
MICHAEL HOOPER, Assistant Director
Kentucky Bar Association
403 Wapping Street
Frankfort, Kentucky 40601

Attorneys for Repondent:

MICHAEL R. McMAHON
835 West Jefferson, #202
Louisville, Kentucky 40202

HENRY A. TRIPLETT
3rd Floor, 231 South Fifth Street
Louisville, Kentucky 40202

(Footnote continued from preceding page)

Kentucky Bar Association v. Littleton, Ky., 560 S. W. 2d 5 (1977);
Kentucky Bar Association v. Dillman (disbarment), Ky., 562 S. W. 2d 318 (1978);
Kentucky Bar Association v. Littleton, Ky., 561 S. W. 2d 88 (1978).

APPENDIX B

SUPREME COURT OF KENTUCKY

KENTUCKY BAR ASSOCIATION

v.

MICHAEL R. McMAHON

File No. 78-SC-455-KB

In Supreme Court
Opinion Rendered November 21, 1978

MANDATE

It is therefore ordered that the Respondent, Michael R. McMahon, be and he is hereby suspended from the practice of law in this Commonwealth for a period of one year.

It is therefore considered that the Respondent is further ordered to comply with RAP 3.390, a copy of which is attached and considered included as a part of this mandate.

It is further ordered that Respondent be required to pay the costs in this proceedings.

January 16, 1979 Respondent's Petition for Rehearing Denied.

A Copy—Attest:
(s) Martha Layne Collins,

Issued January 16, 1979 Clerk

APPENDIX C

SUPREME COURT OF KENTUCKY

78-SC-455-KB

KENTUCKY BAR ASSOCIATION - - - *Complainant*

v.

MICHAEL R. MCMAHON - - - - *Respondent*

ORDER GRANTING STAY OF EXECUTION AND ENFORCEMENT OF THE MANDATE

On motion of the respondent Michael R. McMahon, pro se, a stay of execution and enforcement of this Court's mandate of January 16, 1979, is granted effective January 31, 1979, for the period to and including May 1, 1979, in order that respondent may make application to the Supreme Court of the United States for a writ of certiorari.

Any additional request for stay deemed necessary should be addressed to the Supreme Court of the United States.

Entire Court sitting. All concur.

ENTERED January 31, 1979.

(s) John S. Palmore
Chief Justice

APPENDIX D

SUPREME COURT OF KENTUCKY

KENTUCKY BAR ASSOCIATION - - - *Complainant*

v.

MICHAEL R. MCMAHON - - - - *Respondent*

CHARGE

Comes now the Kentucky Bar Association, by and through its Inquiry Tribunal, and states that Respondent Michael R. McMahon, whose last known address is 228 South Seventh Street, Louisville, Kentucky, a member of said assocation, did engage in the following unprofessional and unethical conduct:

I

In or about March, 1974, Mary C. Phillips, whose last known address is 7602 Buena Vista Court, Louisville, Kentucky, employed Respondent to bring suit and seek recovery of damages arising from a traffic accident. Mrs. Phillips was falsely told by Respondent on many occasions that he was attending to her legal representation and had filed suit. On or about October 23, 1976, Respondent admitted to Mrs. Phillips that he had neglected to file suit and that the statute of limitations had expired.

II

Within the same facts and circumstances contained in Count I above, Mrs. Phillips was having great financial difficulties which included debts for medical x-rays and to her local sewer district. In or about December, 1975, Re-

spondent loaned $600 to Mrs. Phillips informing her that it was to be repaid out of the proceeds of any settlement they may recover.

III

Within the same facts and circumstances contained in Count I above, Respondent, on or about October 23, 1976, told Mrs. Phillips of his failure to file suit and tendered to her a check drawn upon his "Attorney at Law, Escrow Account" at the Liberty National Bank and Trust Company of Louisville, Kentucky, account no. 00084069 payable to Mrs. Phillips in the amount of $4,321.50. Respondent told Mrs. Phillips she could use said sum for the debt owed to the sewer district. Respondent did not inform Mrs. Phillips as to whose funds from his escrow account she was being given.

WHEREFORE, Complainant charges that such actions by Respondent constitute unethical and unprofessional conduct calculated to bring the bench and bar of Kentucky into disrepute; and that discipline of an appropriate degree should be administered to Respondent in accordance with RAP 3.380.

Kentucky Bar Association
By: (s) William P. Donan
Chairman, Inquiry Tribunal

Attest:
(s) Leslie G. Whitmer
Director, Kentucky Bar
Association

APPENDIX E

SUPREME COURT OF KENTUCKY

KENTUCKY BAR ASSOCIATION - - - *Complainant*

v.

MICHAEL R. McMAHON - - - - *Respondent*

RESPONSE

For response herein, the respondent states as follows:

1. He admits the allegations contained in paragraphs 1, 2, and 3 except any allegations as to the falsity of representations made by the respondent to Mary C. Phillips.

Robert E. Delahanty
Counsel for Respondent
Suite 401, 701 West Walnut Street
Louisville, Kentucky, 40203

It is hereby certified that a copy hereof was on April 5, 1977, mailed to Mr. Leslie Whitmer, Director, Kentucky Bar Association, 315 West Main Street, Frankfort, Kentucky, 40601.

Robert E. Delahanty

APPENDIX F

SUPREME COURT OF KENTUCKY

KENTUCKY BAR ASSOCIATION - - - *Complainant*

v.

MICHAEL R. MCMAHON - - - - *Respondent*

REPORT OF TRIAL COMMITTEE

Pursuant to RCA 3.360, your Trial Committee files the following report.

STATEMENT OF CHARGES

The respondent is charged with: (1) falsely advising a client as to the status of litigation; (2) loaning a contingency fee client certain monies; and (3) paying a client money from an "attorney at law escrow account".

STATEMENT OF DEFENSES OFFERED BY RESPONDENT

The respondent admitted the allegations contained in the charges, but specifically denied the falsity of any representations.

STATEMENT OF TRIAL PROCEEDINGS

A hearing was held before the Trial Committee, at the Jefferson County Courthouse, Louisville, Kentucky, on July 29, 1977. The Kentucky Bar Association was represented by the honorable Carroll M. Redford, Sr. The respondent was represented by the honorable Robert E. Delahanty, attorney at law.

Evidence was heard from the complaining witness, Mrs. Mary C. Phillips, on behalf of the Bar Association. The respondent offered as evidence at the hearing the testimony of Peter F. Manning, of Louisville, Kentucky, a member of the Kentucky Bar; and of Mr. Forrest Lindsay Yocum, of Louisville, Kentucky.

The respondent supplemented his proof with the depositions of Dr. S. Stanton Baker and attorney Harry Hargadon, Jr., taken on August 16, 1977.

FINDINGS OF FACT

1.

Mary C. Phillips had previously been in a series of automobile accidents; and had suffered pain as early as 1969, for which she wore a back brace for an extended period of time. She continued to have pain in the cervical area, through 1973. Mrs. Phillips' most recent automobile accidents before the one in question were on December 13, 1973, and December 15, 1973.

2.

Respondent, Michael R. McMahon, entered into a contingent fee contract dated August 24, 1974, for the representation of Mary C. Phillips in her claim for personal injuries growing out of an automobile accident on January 29, 1974 (the official accident report relative to the automobile accident bears the date of January 31, 1974).

3.

On August 7, 1974, Mary C. Phillips was admitted at St. Anthony's Hospital, Louisville, Kentucky, for a surgical operation.

4.

Mary C. Phillips, in addition to her physical complaints, was undergoing extreme emotional hardship, due to poor financial circumstances and the responsibility of supporting infant children in a broken home.

5.

The respondent herein failed to file a tort action to recover damages for Mary C. Phillips within the one-year time prescribed by law.

6.

The respondent advised Mary C. Phillips of his failure to file the action, and further advised her that his interests were adverse to her, and that she should consult other counsel.

7.

Respondent paid Mary C. Phillips the sum of $4,322.50, in addition to approximately $600.00 in loans.

8.

No release was taken from Mary C. Phillips by the respondent upon payment of the sums of money.

9.

The $200.00 loans, on each of three occasions, were made for the purpose of alleviating Mrs. Phillips' financial hardships, not the least of which was caused by her inability to have funds to pay for a "sewer tap" to her home.

10.

The $4,322.50 paid by the respondent to Mary C. Phillips (not including some $600.00 in loans to her) constituted the reasonable value of her case. Mrs. Phillip's tort claim was "questionable" both because of her previous injury and the apparent light nature of her accident.

11.

The respondent suffers from alcoholism. The respondent's alcoholic condition is presently stabilized. Alcoholism is an affliction for which there is no known cure. However, stabilization can be effectuated by various processes which will enable the patient to adequately negotiate life.

STATEMENT OF CONCLUSIONS

Charge Number One concerning the veracity of statements by the respondent to Mary C. Phillips, is not proven.

Charge Number Three regarding the payment of monies from an escrow account, is of no merit.

Charge Number Two concerning loans to a contingency fee client, is specious.

STATEMENT OF RECOMMENDATIONS

It is the recommendation of this Trial Committee that Charge Numbers One and Three be taken for naught; and that Charge Number Two be subjected to a "private" reprimand for the sole reason that the rule is in existence.

Dated January , 1978.

(s) John D. Miller, Chairman
(s) Harry W. Berry
(s) Darrell Hancock

APPENDIX G

SUPREME COURT OF KENTUCKY

KENTUCKY BAR ASSOCIATION - - - *Complainant*

v.

MICHAEL R. McMAHON - - - - *Respondent*

FINDINGS OF FACT, CONCLUSIONS OF LAW, OPINION AND ORDER OF THE BOARD OF GOVERNORS, KENTUCKY BAR ASSOCIATION

This matter was heard by the duly constituted Board of Governors at their regular meeting July 21, 1978, at Ken Lake State Park.

The Respondent, Michael R. McMahon, was charged by the Inquiry Tribunal of the Kentucky Bar Association under provisions of RAP 3.160 et sequi, on March 17, 1977, alleging conduct, which is calculated to bring the bench and bar into disrepute. The Respondent was charged with: (1) falsely advising a client as the status of litigation; (2) loaning a contingency fee client certain monies; and (3) paying a client money from an "attorney at law escrow account." These charges were duly served upon the Respondent by certified mail by the Director on March 17, 1977. A response to the charges was filed by Honorable Robert E. Delahanty, counsel for Respondent, admitting the allegations contained in the three paragraphs of the charge, except any allegations as to the falsity of representations made by the Respondent to Mary C. Phillips. On April 28, 1977, Honorable John M. Milliken, Chairman of the House of Delegates of the Kentucky Bar Association appointed Honorable Carroll

M. Redford, Sr., as attorney for Complainant and appointed Messrs. John D. Miller, Harry W. Berry, and Darrell B. Hancock as Trial Committee to conduct the hearing.

On July 29, 1977, the Trial Committee met in the Fiscal Court Room, Jefferson County Courthouse, Louisville, Kentucky, with Honorable Carroll M. Redford, Sr., being present and representing the Complainant along with Honorable John T. Damron and the Respondent was present and represented by Honorable Robert E. Delahanty. The evidence of the complaining witness, Mary C. Phillips, was heard for the Complainant. The Respondent did not testify, but the testimony of Attorney Peter F. Manning was taken and also that of Mr. Forrest Lindsay Yocum, member of Alcoholics Anonymous. Also, the Respondent offered the depositions of Dr. S. Stanton Baker and Attorney Harry Hargadon, Jr.

The report of the Trial Committee was duly accepted and the Board heard the report concerning the charges. Each charge was discussed at length and the facts were presented to sustain each charge in reference to charge (1) falsely advising a client as to the status of litigation it was noted in the record on page 12, question 55, when Mrs. Phillips was asked: "If she checked with Mr. McMahon often," she said, "Very often"; then question 56, "What report would be made to you?" she answered, "he was still working on it." On page 42, after Mrs. Phillips had been asked, "If a Mr. Huff had called and checked at the courthouse to see if the suit had been filed?" her response to question 135, "Then following that telephone call to the courthouse, did you call Mr. McMahon and discuss it with him?" "Yes sir." Her answer to question 136, "What did he tell you?" "That he had filed one." Based upon these responses, which were not denied, the Respondent had in fact falsely advised his client as to the status of litigation.

In reference to charge (2) loaning a contingency fee client certain monies, it was apparent that Mrs. Phillips

was telling the truth and really had no reason to lie about the money, since it was admitted that he let her have money on four different occasions. There were three checks for $200.00 each and one check for $4,321.50. When asked about the three checks that were for $200.00, as we find on page 18, question 85, Mrs. Phillips stated in answer to the question, "Now, did you ever receive any additional funds, money from Mr. McMahon?" Her answer was, "To me, it was like a personal loan. I said, What about paying you back? He said, well, we will settle that when the settlement comes along." It was obvious that the Respondent had loaned money to Mrs. Phillips. There was also no doubt that the Respondent had paid his client money from his attorney at law escrow account, because the check for $4,321.50, was noted of record and made a part of the evidence and not denied.

The witness, Attorney Peter F. Manning, testified that he had known Mr. McMahon since October, 1973, and had shared an office in Louisville with him. He also stated that Mr. McMahon was a good attorney, but did have a drinking problem at the time he was hired by Mrs. Phillips. However he did not know anything about the Phillips' case.

The witness, Forrest Lindsay Yocum, stated that he was a General Electric Company worker and was a member of Alcoholics Anonymous and had met Respondent at some of their meetings and felt that he could be helped. However, ever, he did not know anything about the Phillips' case.

The deposition of Dr. S. Stanton Baker was presented on behalf of the Respondent and Dr. Baker testified that he was an expert in the field of alcoholism and that he saw Mr. McMahon for about a 30 minute period. He felt that alcoholism was a disease and could be helped and that the Respondent could be helped. He did not know anything about the Respondent during the period of 1974.

The deposition of Attorney Harry Hargadon, Jr., was presented on behalf of the Respondent and testified that he

was an expert in the field of personal injury cases and that based on the facts presented to him, including the medical testimony, the value of Mary C. Phillips case as to damages was in the range of $4,000.00 to $6,000.00.

THE BOARD OF GOVERNORS MAKES THE FOLLOWING FINDINGS OF FACT:

1. The complaining witness, Mary C. Phillips, was in several accidents in Louisville, Kentucky, however, the one accident that we are concerned with is the one that occurred on Jauuary 29, 1974, and that she went to see Respondent, Michael R. McMahon, and entered into a contingency fee contract in March, 1974, however, the contract was not signed until August 24, 1974.

2. During the latter part of 1974 Mary C. Phillips was having personal difficulties and financial problems and the Respondent loaned her $200.00 on each of three occasions and the complaining witness, Mary C. Phillips, stated that she considered it a loan. The Respondent said it could be paid back when the case was settled.

3. During the latter part of 1974 and early part of 1975 Mary C. Phillips contacted Mr. McMahon on several occasions and he stated that he was working on the case. It was during this period that the Respondent made the three $200.00 loans.

4. It was in 1976 when Mrs. Phillips, through a Mr. Huff, had contacted the courthouse and found that no suit had been filed she then asked Mr. McMahon if he filed a suit and he said that he had.

5. On October 23, 1976, Respondent presented to Mary C. Phillips a check for $4,321.50, bearing the notation that it came from Michael R. McMahon, Attorney at Law, Escrow Account, 228 S. 7th Street, Louisville, Kentucky 40202, and no evidence was shown that a settlement had been made, but Respondent did state that Mary C. Phillips and

he had a conflict of interest and that she should get her a lawyer.

6. The Respondent was suffering from alcoholism, but had apparently taken steps to alleviate his problem.

THE BOARD OF GOVERNORS MAKES THE FOLLOWING CONCLUSIONS OF LAW, OPINION AND ORDER:

1. Respondent did falsely advise his client as to the status of her litigation and this was not denied by testimony.

2. Respondent loaned Mary C. Phillips $200.00 on each of three occasions to be paid back out of the contingency fee.

3. Respondent paid Mary C. Phillips money from an escrow account not belonging to Mrs. Phillips and did not advise her that her case had been settled.

4. This conduct was such conduct that could be and was calculated to bring the bench and bar into disrepute.

5. Respondent did have a drinking problem at the time of this transaction and was considered as a mitigating factor in that it brought about his neglect to perform his duty to his client and the fact that he has taken steps to alleviate this problem is a step in the right direction and if such conduct continues should be considered if and when Respondent files for reinstatement.

6. The Board concludes that the Respondent has been found guilty as charged and recommends that Respondent, Michael R. McMahon, be suspended from the practice of law in the State of Kentucky for a period of one year.

Kentucky Bar Association
Board of Governors
(s) B. M. Westberry, President
(s) Leslie W. Whitmer, Director
Kentucky Bar Association

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1534

MICHAEL R. McMAHON - - - Petitioner

VERSUS

KENTUCKY BAR ASSOCIATION - Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

LESLIE G WHITMER
Director-Counsel
Kentucky Bar Association
403 Wapping Street
Frankfort, Kentucky 40601
Counsel for Respondent

May 2, 1979

ROBERTS PRINTING CO., FRANKFORT, KY.

INDEX

CITATIONS

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1534

MICHAEL R. McMAHON - - - Petitioner

VERSUS

KENTUCKY BAR ASSOCIATION - Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Kentucky (Petition, Appendix A1-A4) is reported at 575 S.W. 2d 453.

JURISDICTION

The jurisdictional requisites are not adequately set forth in the Petition. This case does not arise under 28 U.S.C. § 1254 (1), because it is not a review from a Court of Appeals. Jurisdiction would appear to be by virtue of the provisions

of 28 U.S.C. § 1275 (3).

QUESTIONS PRESENTED

1. Whether the decision below or the record raises the questions presented in the petition.

2. Whether the disciplinary proceedings of the Kentucky Bar Association and the Supreme Court of Kentucky denies petitioner substantive due process of law under the Fourteenth Amendment of the Constitution of the United States or inflicted cruel and unusual punishment under the Eighth Amendment to the United States Constitution.

3. Whether the evidence supports the findings and judgment of the Supreme Court of Kentucky.

RULES INVOLVED

Former RAP 3.310....Mental Disability After Misconduct Charged.

If, after a charge of unprofessional conduct has been filed against an attorney, the Trial committee has reason to believe and, after a hearing before that committee, finds that the respondent is of unsound mind, mentally ill, mentally defective or for whom a committee has been appointed, or addicted to intoxicants or drugs to such an extent that, in the judgment of the trial committee, he is incapable of conducting a proper defense to the charge against him, the Trial committee shall recommend to the Board and the Board shall recommend to the Court that the respondent be suspended from the practice of law. If the Court orders his suspension, it shall also direct that all further proceedings on the charge be held in abeyance until it shall appear to the Court, upon application made by the respondent that he is mentally capable of conducting a proper defense to the charge in question; therefore, a hearing on the charge shall be held as provided by the Rules relating to disciplinary cases.

If the Trial committee concludes that the charges have not been sustained, or, having been sustained, do not warrant suspension or disbarment, then the respondent shall be restored to membership in the Association if and when he has satisfied the Trial committee, the Board and the Court by clear and convincing evidence that he has been so completely cured of such insanity, mental illness, mental defectiveness, or addiction that there is little or no likelihood of a recurrence of the condition.
(Deleted 12-31-77)

SCR 3.130 ABA code of professional responsibility recognized as authority

Except for ethical consideration and disciplinary rules insofar as they conflict with the opinion in the Unitel States Supreme Court in *Bates v. State Bar of Arizona,* the court recognizes and accepts the principles embodied in the American Bar Association's code of professional responsibility as a sound statement of the standards of professional conduct required of members of the bar, and the board may cause to be tried all charges brought under this code as well as charges for other unprofessional or unethical conduct tending to bring the bench and bar into disrepute.

SCR 3.165 Temporary suspension by the Supreme Court

On petition of the inquiry tribunal authorized by its chairman and supported by an affidavit demonstrating facts personally known to affiant, showing that an attorney appears to be misappropriating funds he holds for others to his own use, or otherwise improperly dealing with said funds, or has been convicted of a crime as set out in Rule 3.320, or is mentally disabled or is addicted to intoxicants or drugs, and upon a finding that reasonable cause exists to so believe and to believe that unless such order is issued a real and present danger exists that a sum not readily recoverable by those entitled thereto has been or may be misappropriated, or it appears from

the record of such conviction that he has so acted as to gravely put in issue whether he has the moral, physical or mental fitness to continue to practice law, or is so addicted to the use of intoxicants or drugs or is so mentally disabled as to so believe, the court may issue an order, with such notice as the court may prescribe, imposing temporary conditions of probation on said attorney or temporarily suspending said attorney, or both. Any such order of temporary probation or suspension which restricts the attorney in dealing with said funds, shall, when served on any bank maintaining any account upon which said attorney may make withdrawals, serve as an injunction to prevent said bank from making further payment from such account or accounts on any obligation except in accordance with restrictions imposed by the court, and shall direct such bank not to disclose (except to those entitled to withdraw from the account or accounts or to receive payment of such obligation, or upon the express written permission of at least one of such persons as to each such account or obligation) that such order has been received or the contents thereof. Any fees tendered to such attorney thereafter shall be deposited in a trust fund from which withdrawals may be made only in accordance with restrictions imposed by the court. The attorney may for good cause request dissolution or amendment of any such temporary order by petition filed with the court, a copy of which will be served on the director. The court may refer such petition for dissolution to a person who possesses the qualifications of a trial commissioner under Rule 3.250 sitting as a special commissionre for immediate hearing. The special commissioner shall hear such petition forthwith and submit his report and recommendation to the court with utmost speed consistent with due process. Upon receipt of the foregoing report, the court may modify its order if deemed appropriate until final disposition of all pending disciplinary charges against said attorney.

SCR 3.370 Board's action on trial commissioner's report and procedure in the court

(1) Upon receipt of the report of the trial commissioner, the board shall promptly consider and act upon the entire record. Only the president, the president-elect, the vice president and the fourteen duly elected members of the board from their respective Supreme Court districts shall be eligible to be present, participate in, and vote on any displinary case. Any member who has participated in any phase of a disciplinary case submitted to the board under this rule, or has been challenged on grounds sufficient to disqualify a circuit judge shall be disqualified; and the Chief Justice shall appoint a member to consider and act on the case.

(2) Nine of those qualified to sit in a disciplinary matter must be present to constitute a quorum for consideration of such matters.

(3) The board shall decide, by a roll call vote, whether the respondent is guilty or not guilty. If the respondent be found guilty, the board shall then decide by a roll call vote the disciplinary action. Both the findings and any disciplinary action must be agreed upon by 9 or 3/4 of the members of the board present and voting in the proceedings, whichever is less. The result of each of the two votes shall be recorded in the board's minutes, together with a decision of the board giving its findings of fact and conclusions of law and reasons therefor as action and decision of the board, and the director shall sign and file with the director an order setting forth the action and decision of the board, and th edirector shall mail copies of such order and decision together with a copy of the trial commissioner's report, to the parties or their counsel and to each member of the tribunal.

(4) The board will, in its decision, state wherein it differs with the findings of fact of the trial commissioner, and will state the discipline, if any.

(5) The entire record, together with a certified bill for costs and expenses incurred in the investigation preliminary to, and in the conduct of, the proceedings, shall be filed with the clerk by the director.

(6) The respondent may file a notice for the court to review the board's decision within thirty (30) days after the board's decision is filed with the clerk stating reasons for review accompanied by a brief supporting his position on the merits of the case. The director may file a brief within thirty (30) days thereafter in support of the board's decision. Before the notice for review can be filed, the respondent shall furnish a bond with surety acceptable to the clerk, conditioned that if the principal in the bond be disciplined by the court, he will promptly pay all costs incurred in the proceeding including those certified under Rule 3,370. If he files his response *in forma pauperis*, no bond shall be required.

(7) The court may within forty (40) days of the filing of the board's decision notify both the director and respondent that it will review the board's decision. If the court so acts, the director and respondent may each file briefs within forty (40) days with no right to file reply briefs unless by order of the court whereupon the case shall stand submitted. Thereafter, the court shall enter such orders or opinion as it deems appropriate on the entire record.

(8) If the respondent does not file a notice of review or the court does not notify the parties of its review under paragraph (7) of this rule, the court shall enter an order adopting the decision of the board relating to all matters.

(9) When the respondent is proceedel against by warning order, the notice in paragraph (3) and paragraph (7) of this rule shall be deemed to have been served thirty (30) days after the date of the making of the warning order.

SCR 3.380 Degrees of discipline

Upon finding by the board or court under the provisions of Rule 3.370 of guilt or unprofessional conduct, discipline may be administered by way of admonition, private reprimand, public reprimand, censure, suspension

from practice or disbarment. If a private reprimand is issued, it shall not be made public and shall be transmitted only to the respondent, or his attorney, and to the attorney for the complainant, and the court shall order the record sealed subject to reopening only on order of the court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

*United States Constitution, Amendment VIII*s

Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishment inflicted.

United States Constitution, Amendment XIV, Section 1:

. . . . Nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

United States Code

28 U.S.C. § 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon a petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case

as to which instruction are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

COUNTERSTATEMENT OF THE CASE

On March 17, 1977, the Inquiry Tribunal of the Kentucky Bar Association filed a charge against Petitioner (Respondent below) consisting of three separate counts of unethical and unprofessional conduct. Count I alleges that in March, 1974, one Mary C. Phillips employed petitioner to file a personal injury action seeking the recovery of damages arising out of a traffic accident. Petitioner falsely advised and assured Mrs. Phillips on numerous occasions that he had filed a lawsuit on her behalf. On or about October 23, 1976, petitioner admitted to Mrs. Phillips that he had neglected to file the lawsuit and that the statute of limitations had expired. Count II charges that petitioner loaned Mrs. Phillips $600 with the unlerstanding that petitioner would be repaid out of any proceeds recovered through settlement of the lawsuit. Count III alleges that on or about October 23, 1976, petitioner wrote a check payable to Mrs. Phillips in the amount of $4,321.50. The check was written on petitioner's attorney at law, escrow account and petitioner did not inform Mrs. Phillips as to whose funds she was receiving from the escrow account. There was no evidence introduced to show the lawsuit had been settled.

On April 7, 1977, petitioner filed an answer to the charge admitting the allegations contained in each count of the charge except the allegation in Count I that petitioner made false representations to his client. On April 7, 1977, petitioner also filed a motion to make the charge more specific by specifying the Disciplinary Rules of the American Bar Association's Code of Professional Responsibility which it was alleged that respondent had violated. Respondent filed a reply to motion on April 8, 1977, stating the provisions of the Code that had been violated.

A Trial Committee was appointed on April 28, 1977, to conduct an evidentiary hearing. The hearing was held on July 29, 1977, and respondent (complainant below) was ordered to file a brief within twenty days of receiving the transcript with petitioner being allowed to file a reply brief within twenty days thereafter. Petitioner did not testify at the hearing. On August 16, 1977, the depositions of two witnesses were taken by petitioner to be filed in the record when

transcribed. Respondent filed its brief on August 31, 1977, and petitioner filed a brief in reply on September 27, 1977.

The Trial Committee filed its report with the Director on February 1, 1978, finding petitionre not guilty as to Counts I and III and recommended that these two counts of the charge be dismissed. The Trial Committee further found petitioner guilty as to Count II and recommended that he be privately reprimanded.

On July 22, 1978, by a roll call vote of 13-0, the Board of Governors found petitioner guilty as charged on all three counts and recommended to the court that petitioner be suspended from the practice of law for one year and be required to pay the costs of this action. (Appendix to Response, p. 1A-2A). The Board of Governors filed its findings of fact, conclusions of law, and recommendation on August 28, 1978, and on the same day the Director notified petitioner by certified mail of the decisions by the trial committee and the Board of Governors.

Petitioner filed a timely notice for review pursuant to SCR 3.370 (6) and respondent filed a brief in response on October 17, 1978. On November 21, 1978, the court rendered its opinion holding that the record was more than sufficient to sustain the Board of Governor's findings of fact. The Supreme Court of Kentucky adopted the Board of Governors recommendation and ordered respondent suspended from the practice of law for a period of one year.

Petitioner filed a petition for rehearing which was overruled. The Supreme Court of Kentucky and this Court have stayed the operation of the state court mandate pending consideration of the Petition for a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

The respondent, Kentucky Bar Association, respectfully

requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Supreme Court of Kentucky's opinion in this case.

The issues raised by the petitioner in his Petition for Writ of Certiorari concern novel constitutional arguments not involving the procedures utilized by the Supreme Court of Kentucky in disciplining an officer of the court but rather the degree of discipline given a lawyer by the court.

Each issue raised by petitioner will be answered briefly after a short consideration of the general issues in the case.

I

THE DECISION BELOW WAS BASED ON AN ADEQUATE AND INDEPENDENT NON-FEDERAL GROUND

The Court's jurisdiction has been improperly raised under 28 U.S.C. § 1254 (1). The jurisdiction of the court could be properly raised only under the provisions of 28 U.S.C. § 1257 (3). This case is not a review from a court of appeals but rather from a state court. For the purposes of this argument and to prevent delay in the court's final review of this petition, the respondent will assume the Court has jurisdiction of the case.

During the course of the disciplinary proceeding before the respondent and the Supreme Court of Kentucky never once did respondent raise a federal constitutional issue in any response, answer, briefs, petitions, or hearings before the Inquiry Tribunal, Trial Committee, Board of Governors or the Supreme Court of Kentucky. Counsel for respondent has carefully reviewed all transcripts, depositions, pleadings, briefs and petitions filed in the state court and has failed to find any mention of "due process" and "cruel and unusual punishment" arguments raised in the disciplinary proceeding. In fact, the complaint was filed against peti-

tioner on November 15, 1976; however, respondent did not learn that petitioner was relying on his alcoholic condition as a mitigating circumstance in his disciplinary case until his trial hearing on July 29, 1977.

Respondent has included in the Appendix to this response the arguments of petitioner's two (2) lawyers representing him at different stages of the state court proceeding clearly showing that at no time were federal constitutional issues raised even though petitioner had many occasions to raise the issues.

Appendix II — Petitioner's preliminary answer dated December 10, 1976, stating the complaint raised legal issues not ethical considerations. (Appendix to Response, Page 3-A).

Appendix III — Respondent's assistant director on February 7, 1977, impressed on petitioner the seriousness of the matter and asked for a more complete response. (Appendix to Response, Page 4-A).

Appendix IV — Petitioner's response on February 8, 1977, to the assistant director of respondent stating that the complaint should be dismissed for failure to state a cause of action stating that more than a single act or omission for neglect constituted grounds for discipline and further stating hat the complaining party had been given a $4,321.50 check. (Appendix to Response, Page 5-A).

Appendix V — A general response to the displinary charge admitting the allegations of the charge but denying any misrepresentations. (Appendix to Response, Page 6-A).

Appendix VI — Opening statement of petitioner at trial hearing on July 29, 1977, raising for the first time the allegation that petitioner had a problem with alcohol. (Appendix to Response, Page 7-A).

Appendix VII — Portion of argument from brief of petitioner by first counsel before a trial committee stating it would, in effect, be harsh and inhuman to harshly discipline an attorney for behavior that is the direct result and manifestation of disease but raising no federal constitutional question whatsoever. (Appendix to Response, Page 8A-9A).

Appendix VIII — Portions of Notice for Review and Brief on Behalf of Respondent setting forth all defenses and mitigation circumstances while stating that a one year suspension period was too severe but never raising a federal constitutional issue of any kind. The notice was filed by petitioner's second counsel. (Appendix to Response, Page 10A-13A).

Appendix IX — Portion of Petition for Rehearing arguing that one year suspension period was too severe and that petitioner's alcoholism was a mitigating circumstance but failing to raise any federal constitutional issues. The petition was filed by petitioner's second counsel. (Appendix to Response, Page 14-A).

It is clear that petitioner's third counsel filing the Petition for Writ of Certiorari has failed to raise any federal constitutional issues before this court that have been raised before the state court below. Petitioner was given every opportunity before the state court to raise federal constitutional issues but he failed to do so. The petition for Writ of Certiorari must be denied on this basis.

> "It is essential to the jurisdiction of the Supreme Court under § 1257 that a substantial federal question has been properly raised in the state court proceeding."[26]
>
> • • • •
>
> "For purposes of certiorari under subsection (3), the validity of such a treaty or statute must have been 'drawn in question' or a federal title, right, privilege or immunity must have been specially set up or claimed.' These

phrases, 'drawn in question' and 'specially set up or claimed', are substantially identical in nature, both of them referring to the raising of a substantial federal question in the correct manner."

Stern & Gressman, *Supreme Court Practice,* 5th edition (1978) at page 208.

It is interesting to note footnote 36 shown above stating:

"The admonition bears repeating 'that if you are about to commence litigation (in a state court) in which there may be involved, then or ultimately, a question arising under the Constitution or laws of the United States, you must raise the federal question at the outset and not as an afterthought after you have lost below. By that time you are almost always too late . . . unless you build the record in your state litigation so that you *do* make a federal case out of it, you not only do not have a rosy chance of review, you don't have any chance at all.' Wiener, *Wanna Make a Federal Case Out of It?* 48 A.B. A.J. 59, 60, 62 (1962)."

Even though petitioner's petition for writ of certiorari must be denied on the foregoing argument, respondent will answer the constitutional question raised in the petition.

II

THE DISCIPLINARY PROCEEDINGS OF THE KENTUCKY BAR ASSOCIATION AND THE SUPREME COURT OF KENTUCKY DID NOT DENY PETITIONER SUBSTANTIVE DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES NOR INFLICT CRUEL AND UNUSUAL PUNISHMENT ON PETITIONER UNDER THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Disciplinary cases in the Commonwealth of Kentucky have always been civil by nature as a matter of sound state law. *Commonwealth ex rel Buckingham v. Ward,* Ky., 267 Ky. 677 (1937). Petitioner on page 15 of his petition states that *In re Ruffalo,* 390 U.S. 544, 551 (1968), holds that state

disclipinary proceedings are "of a quasi-criminal nature". The *Ruffalo* case dealt with a federal disbarment proceeding not a state proceeding. This Court had before it the state proceeding but denied the Petition for Writ of Certiorari. *Ruffalo v. Mahoning County Bar Association,* 379 U.S. 931 (1964). Petitioner never contends that he has not received procedural due process under the Rules of the Supreme Court of Kentucky, but argues that substantive due process has not been given because a one year suspension under the facts of this case denies due process of law. While this Court has never, to respondent's knowledge, held a state disciplinary proceeding lacks substantive due process, it is certainly clear this case raises no important constitutional issues warranting review by this Court in setting a precedent to grant review of the opinion of the Supreme Court of Kentucky.

Petitioner's due process argument is novel. He has cited no legal authority applying a substantive due process standard to suspension of alcoholic lawyers, where the illness has been arrested or not, nor has he cited legal authority showing that such a suspension period constitutes "cruel and unusual punishment."

This Court has consistently held that states have a stron interest through their courts in disciplining their members. The Court stated in *Goldfarb v. Virginia State Bar, et al.,* 955 S. Ct. 2004 (1975) at p. 2016:

"We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests, they have broad power to establish standards for licensing practitioners and regulating the practice of professions. We also recognize that in some instances the State may decide that 'forms of competition usual in the business world may be demoralizing to the ethical standards of a pro-

fession.' *United States v. Oregon State Medical Society*, 343 U.S. 326, 336, 72 S. Ct. 690, 697, 96 L. Ed. 978 (1952), see also *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 611-613, 55 S. Ct. 570, 571-572, 79 L. Ed. 1086 (1935). The interest of the States in regulating lawyers is especially great since lawyers are essential to th primary governmental function of administering justice, and have historically been 'officers of the courts.' See *Sperry v. Florida*, 373 U.S. 379, 383, 83 S. Ct. 1322, 1325, 10 L. Ed. 2d 428 (1963); *Cohen v. Hurley*, 366 U.S. 117, 123-124, 81 S. Ct. 954, 958, 6 L. Ed. 2d 156 (1962); *Law Students Research Council v. Wadmand*, 401 U.S. 154, 157, 91 St. Ct. 720, 723, 27 L. Ed. 2d 749 (1971). In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act, we intend no diminution of the authority of the State to regulate its profesions"

The Supreme Court of Kentucky through SCR 3.130 has adopted the provisions of the American Bar Association's Code of Professional Responsibility as a sound statement of the standards of professional conduct required of members of the bar and disciplinary charges may be tried under this code as well as for other unprofessional or unethical conduct tending to bring the bench and bar into disrepute. The Code of Professional Responsibility clearly states:

"DR 6-101 (A) (3)

(A) A lawyer shall not:

* * *

(3) Neglect a legal matter entrusted to him."

The Supreme Court of Kentucky in the opinions cited in Footnote 4 of the opinion of this case cites numerous examples of its neglect cases stating that without exception, each lawyer was suspended from the practice of law for a term commensurate with his degree of neglect. (Appendix to Petition, page A 3-4). While our state court is strict on

neglect, it gives discipline on a case by case basis. In the case of *Kentucky Bar Association v. Littleton*, Ky., 560 S.W. 2d 5 (1977), the court found that Littleton had in one case failed to timely file a workman's compensation claim and his client had some difficulty in locating him. There was no misrepresentation made to the client. The court ordered a two year suspension period. Littleton could show no mimtigating circumstances and failed to answer the disciplinary charge. On the other hand, petitioner has proved that his neglect was caused by the disease of alcoholism. The Court was very lienent and, in view of the mitigating circumstances, gave a one year suspension period.

The Supreme Court of Kentucky in SCR 3.380 states that a lawyer found guilty of unprofessional conduct may be disciplined by way of admonition, private reprimand, public reprimand, censure, suspension from practice or disbarment. The court has clearly followed ts rule in ordering a one year suspension period. In disciplinary cases the report of the Trial Committee and the decision of the Board of Governors are advising only; therefore, the court is the ultimate fact finder and orders all discipline. *Kentucky Bar Association v. Stivers*, Ky., 475 S.W. 2d 900, cert. denied, 406 U.S. 968 (1977). The Board of Governors and the Court commended petitioner for his rehabilitation as "a step in the right direction and if such conduct continues should be considered if and when respondent (McMahon) files for reinstatement." The Court also stated that the practice of law demands a meet and lively responsibility and if petitioner does not possess it he belongs in some other line of work. (Appendix to Petition, page A-3).

The Supreme Court of Kentucky certainly recognizes the need for a rule regarding the mental disability of and addiction to intoxicants or drugs, by members of its bar. SCR

3.165 provides for its Inquiry Tribunal to petition it for imposng temporary conditions of probation on an ill member or temporary suspending the member or both. Had petitioner raised his drinking problem before the tribunal as a defense to the complaint or subsequent cahrge, the case may have been treated under this rule or its predessor RAP 3.310. Certainly, in a state court civil proceeding, it would be beyond the imagination to say that the provisions of the Eighth Amendment to the United States Constitution could even be remotely involved.

Petitioner's disciplinary case has been properly processed under the rules of the Supreme Court of Kentucky to a proper conclusion. There are no conflicts in opinions among state courts or federal courts on the law of this case. The Supreme Court of Kentucky has used its sound discretion in what should be done with petitioner in relation to his practice of law in its state courts bearing in mind the interest of the public who has suffered as a result of his neglect. Beyond all doubt, this case has not acquired the importance necessary to warrant review by this Court. The decision of the court below is not erroneous nor shocking. There are no factual issues present. There is the presence of an adequate non-federal ground for the decision based on Kentucky law. This Court would not excercise its jurisdiction to reexamine the judgment of the Supreme Court of Kentucky as to whether a lawyer should be placed on probation or suspended from practice for one year. There were no federal or state constitutional issues raised before the lower court and there are no valid federal constitutional questions raised before this Court.

III

THE DECISION BELOW IS CORRECT AND THERE ARE NO JUSTICIABLE REASONS FOR GRANTING THE WRIT

The neglect of a client's cause is a serious matter in the Commonwealth of Kentucky. The record before the Supreme Court of Kentucky in this case goes beyond mere neglect. Petitioner neglected his clients case and then lied to her by stating a lawswuit had been filed when he had not done so. The aggrieved client gave the following testimony before the Trial Committee (Transcript, pages 41-42):

Q. 134 Now, one other question. You went to Mr. McMahon in March, 1974. When did it come to your attention, when did you first have knowledge that he had not filed this suit on your behalf?

A. Well, there were accusations made to me by friends that there's something wrong. Something is wrong, Mary. I said no, that these things just take a long time. When I put my full confidence and put it in his lap, I said take it, take care of it. It was in 1976 when I got aware of this, when Mr. Huff, a friend I called, and checked with the courthouse, and he said he could not find where there had been anything filed.

Q. 135 Then following that telephone call to the courthouse, did you call Mr. McMahon and discuss it with him?

A. Yes, sir.

Q. 136 What did he tell you?

A. That he had filed one.

Our Code of Professional Responsibility was breached by this misrepresentation:

"DR 1-102 Miscounduct.

(A) A lawyer shall not:

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

Petitioner not only was neglectful and made a misrepresentation to his client, but he made unethical loans of money to his client for general living expenses with payment to come from the proceeds produced in the lawsuit. This conduct clearly violates the Code of Professional Conduct:

"DR 5-103 (B):

> While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client . . . ."

In addition, petitioner in making restitution to his client, presented her with a check in the amount of $4,321.50 drawn on his attorney at law escrow account. There was no evidence presented to show that any settlement had been reached nor that petitioner had deposited his own money in the escrow account and then disbursed it to the client. Petitioner did not testify at his hearing..

Petitioner's case was more than the single neglect case. His misconduct extended beyond a missed deadline that could be attributed to his addiction to alcohol. His misrepresentations, unethical loans to his client and misuse of his law office escrow account was conduct which is highly unprofessional. A one year suspension period was a generous finding in petitioner's favor. The Supreme Court of Kentucky found that the evidence was more than sufficient to sustain the one year suspension period. (Appendix to Petition, page A-3). The public interest must be protected. A suspension period contacted with reinstatement procedures will reasonably assure the public that it will not be subject to further harmful conduct at petitioner's hands. There is valid reason for the court's action.

The Per Curiam Opinion of the Supreme Court of Kentucky is based soundly on facts in the record of pleadings, briefs and evidence before it The court and the Board of Governors supported by the court considered all defenses offered by petitioner and clearly stated so. A fair reading of the entire record supports the entire opinion of the court. The opinion clearly cites the evidence it found in the record to support its findings. The court applied a clear standard to the facts and its grave effect on the image of the bench and bar.

CONCLUSION

It is respectfully submitted that this Petition for Writ of Certiorari should be denied because no federal constitutional issues were raised at any point in the lower court and for the other reasons stated.

Respectfully submitted

LESLIE G. WHITMER
Director-Counsel
Kentucky Bar Association
403 Wappin Street
Frankfort, Kentucky 40601
Counsel for Respondent

APPENDIX

APPENDIX I

MINUTES AND CERTIFICATION OF PROCEEDING BY BOARD OF GOVERNORS KENTUCKY BAR ASSOCIATION

IN RE: MICHAEL R. McMAHON

I, B. M. Westberry, President, do certify:

This cause came on for consideration by the Board of Governors of the Kentucky Bar Association, 13 members entitled to vote on disciplianry matters being present, and all other persons and staff absent from the room.

The record of the case was physically present.

On motion made and seconded, the report of the Trial Committee was received.

The case was discussed, the discussion being confined to the record.

After full consideration, a roll call vote was taken on the issue of guilt or innocence. The result:

Guilty—13

Not Guilty—0

Abstaining—0

After discussion was held on the appropriate punishment, a roll call vote was held with a majority of 13 recommending to the Supreme Court of Kentucky that the respondent, Michael R. McMahon, be suspended from the practice of law for one (1) year and required to pay the costs in this action.

Pursuant to SCR 3.370, a written decision of the Board was ordered to be filed with the Director.

This certificate and minutes of proceeding, after being inspected by each member voting, are made a part of the record in this case and the minutes of the Association.

This 22nd day of July, 1978.

B. M. WESTBERRY, President

ATTFST:

LESLIE G. WHITMER, Director

APPENDIX II

December 10, 1976

Mr. Leslie Whitmer, Director

Kentucky Bar Association

315 West Main Street

Frankfort, Kentucky 40601

RE: Michael McMahon

Complaint of Mary C. Phillips

Dear Les:

Mr. McMahon has just left the rather voluminous complaint of Ms. Phillips against him with me and has asked that I acknowledge receipt of same. A preliminary perusal of the complaint that Ms. Phillips has filed indicates to me that this is a case in which she should pursue her legal remedies and not a case of unethical conduct on Mr. McMahon's part.

I would appreciate it if you would ask the Inquiry Tribunal to treat this as our preliminary answer in this matter.

Sincerely,

Robert E. Delahanty

RED:je

APPENDIX III

February 7, 1976

CONFIDENTIAL

Robert E Delahanty, Esquire
701 West Walnut Street, Suite 401
Louisville, Kentucky 40202

Re: Michael R. McMahon, Esquire

Dear Mr. Delahanty:

In regard to the response you filed for the above attorney to Mrs. Phillips' complaint, we would point out that neglect has historically constituted grounds upon which disciplinary sanctions may be imposed.

We would certainly appreciate knowing whether, in fact, suit was not filed as alleged in the complaint. Mrs. Phillips alleges she received some $600 from Mr. McMahon which was an advance on her forthcoming settlement. It is also of concern that the check Mr. McMahon wrote to Mrs. Phillips for $4,321.50 dated October 23, 1976, was written on his escrow account.

You certainly are not obligated to add anything to the previous response, but this letter only provides another opportunity to help the Inquiry Tribunal fully realize the factual situation.

Sincerely,

John T. Damron

Assistant Director

JTD/sp

APPENDIX IV

February 8, 1977

Mr. John T. Damron
Assistant Director
Kentucky Bar Association
Frankfort, Kentucky 40601

RE: Michael R. McMahon, Esquire

Dear Mr. Damron:

I am in complete disagreement with the first paragraph of your letter and feel that a reading of informal opinion 1273 of the American Bar Association enclosed herewith certainly says affirmatively that there must be more than a single act or omission for negligence to constitute grounds for discipline.

It seems to me under the circumstances that Mrs. Phillips' complaint should be dismissed for failure to state cause of action.

You might be interested in knowing that Mrs. Phillips has certified the $4,321.50 check but that we have been unable to ascertain as yet whether or not she has cashed the check.

Thank you for your cooperation.

Sincerely,

Robert E. Delahanty

RED:je
Enc.

APPENDIX V

SUPREME COURT OF KENTUCKY

KENTUCKY BAR ASSOCIATION - - Complaintant

vs. RESPONSE

MICHAEL R. McMAHON - - - - Respondent

* * *

For response herein, the respondent states as follows:

1. He admits the allegations contained in paragraphs 1, 2, and 3 except any allegations as to the falsity of representations made by the respondent to Mary C. Phillips.

ROBERT E. DELAHANTY
COUNSEL FOR RESPONDENT
Suite 401, 701 West Walnut Street
Louisville, Kentucky 40203
583-8308

It is hereby certified that a copy hereof was on April 5, 1977, mailed to Mr. Leslie Whitmer, Director, Kentucky Bar Association, 315 West Main Street, Frankfort, Kentucky 40601.

ROBERT E. DELAHANTY

APPENDIX VI

KENTUCKY BAR ASSOCIATION

v. MICHAEL R. McMAHON

SUPREME COURT OF KENTUCKY

No. 78-SC-455-KB

(Transcript of Trial Hearing, July 29, 1977, Page 46-)

OPENING STATEMENT

BY MR. DELAHANTY:

My contention about this case, number one, we admit that the suit was never filed, and there was negligence in failing to file it. We feel that does not come under the ethics of profession. It's something where, as he certainly said to his client, we are in an adversary position, and suggested that she go see another lawyer. We think that comes under the the informal opinion 1273.

Mike and I have talked at recess, and I feel, in my opinion, lawyers make the lousiest witnesses that I know of. So, I have come to the conclusion that I'm not going to put Mr. McMahon on the stand at all. What I'm going to do is to show in terms of litigation of his negligence of this case, in the very brief time we are speaking of, that Mike was involved in a problem with alcohol.

APPENDIX VII

MICHAEL R. McMAHON'S BRIEF BEFORE TRIAL COMMITTEE, FILED 9-27-77, Pages 7-8

ALCOHOLISM

It is submitted here that there is an issue presented by the record in this case that was almost totally disregarded by the brief of the Bar Association.

The record clearly shows that the Respondent, during the relevant period of time, was ill with active alcoholism. The record further shows that before the complaint herein was brought, the Respondent, by self-help and membership and participation in Alcoholics Anonymous, has recovered from the debilitating effects of the disease of alcoholism. While it must be conceded that an alcoholic cannot literally be cured so that he may again drink alcoholic beverages in moderation, the disease and the devastating effects of it can be abated by total abstinence. This, the Respondent has accomplished.

The very conduct of the Respondent that is complained of was, by the testimony of Dr. Baker, a normal system or manifestation of the disease.

The record clearly demonstrates that, after the Respondent attained his sobriety, his conduct and behavior was consistent with the highest professional and moral standards.

It would be most unjust to harshly discipline an attorney for behavior that is the direct result and manifestation of disease. The restitution made to Mrs. Phillips, and Respondent's candid admission to her that he had been negligent and that their interests were adverse, is ample evidence of the Respondent's recovery from the disease, and his usual

professional conduct.

Surely the harsh and inhuman position taken by the brief for the Bar Association should be rejected. At page four of their brief, they suggest that the Respondent's illness "should not be looked upon as an excuse for misconduct, but rather a buttress for disciplinary sanctions." Such a position would require a rejection of enlightened medical and legal thinking. Alcoholism is a disease recognized as such by both the American Medical Association and the American Bar Association. Some state Bar Associations have established positive action programs to help alcoholic members attain recovery from the progressive debilitating effects of the disease.

The record in this case supports a finding and conclusion that the negligence of the Respondent was the result of his illness and is not typical of his usual standard of profesional conduct.

APPENDIX VIII

KENTUCKY BAR ASSOCIATION

V. MICHAEL R. McMAHON

SUPREME COURT OF KENTUCKY

No. 78-SC-455-KB

(Notice for Review and Brief on Behalf of Respondent)
(Page 3-5)

ARGUMENT

A. Negligence and Inattention of the Type Described in This Record Is Insufficient to Warrant Disciplinary Action By the Court.

The whole concept of discipline for negligence and inattention is troublesome to the writer of this petition. To put it bluntly, there are cases and there are cases. This coupled with the imprecision and cagueness of the canon relating to inattention to a client's affairs compounds the problem. In considering the case at bar, we think the Court and the Board of Governors overlooked material facts and factors in this record. They are:

(a) Respondent's admission of the facts alleged with the exception of the falsity of the representation.

(b) He made his client whole and there is no contention to the contrary.

(c) He did not attempt to thwart the investigation and he was cooperative.

(d) He was beset with an illness which accounted for

any negligence that he may have performed.

(e) He did not attempt to shield himself from any civil claim for malpractice by taking a release from his client when he made redress to her.

(f) He has not been the subject of previous disciplinary actions.

(g) There is no evidence that his performance as a lawyer before he became afflicted with alcoholism was other than good and a credit to the bar.

(h) He has participated timely in these proceedings and has not ignored the charges made and has timely presented his defenses to them.

This subject is exhaustively annotated in 96 A.L.R. 2d 823.

Without detailing the entire annotation, we find the following to be considered aggravating circumstances.

(a) Ignoring the client's request for information or for settlement. Obviously, there was plenty of contact with the client because respondent lent her $200 on three occasions.

(b) False representation to the client. This Court found that he had told the client that he was working on the case. Respondent may well have been working on the case and still not filed the suit timely.

(c) Attempts by attorneys to thwart or impede the investigation. None of that is present in this case.

(d) Attorney's prior history of misconduct. None has been alleged or proven here.

The following are considered mitigating circumstances:

(a) Personal misfortune of an attorney.

(b) Attorney's good character.

(c) Attorney's previous record.

(d) Absence of evil or fraudulent intent.

(e) Admission of negligence.

(f) Willingness to reimburse client for any loss suffered.

Here, the respondent paid his client for the loss suffered and, apparently, did not seek repayment of the $600 loaned.

(Pages 13-14)

ARGUMENT II

In the Event the Court Disagrees With Argument I, and Finds That the Respondent Was Guilty of Professional Misconduct, Then the Punishment Imposed Was Too Severe.

Respondent sincerely believes that the charges were not established by a preponderance of the evidence. The Trial Committee was not required to believe Mrs. Phillips' statement that respondent told her that the suit had been filed. This portion of the argument relates to the severity of the punishment in the event the Court disagrees with the previous argument made by the respondent. First, it seems undisputed that respondent was afflicted with alcohol during the period involved. Second, it appears that respondent acted honorably and in accord with the discipline rules in correcting whatever wrong he may have done to Mrs. Phillips. Third, he is presently a member of Alcoholics Anonymous which takes considerable courage in itself. Fourth, everyone seems to be sympathetic with respondent's plight. Even the Board of Governors who imposed the one-year suspension commented on his rehabilitation efforts and asked that they be taken into consideration on reinstatement. We

are of the opinion that a one-year suspension is far too severe. In *Kentucky Bar Association v. Booth, supra,* the penalty was six months for conduct far worse than that engaged in by respondent and there is no evidence that Booth attempted to redress any of the wrongs committed by him. In *Kentucky Bar Association v. Graves,* Ky., 556 S.W. 2d 890, Graves stole from his client via the escrow account and was censured.

Suspension or disbarment of a lawyer is not for the purpose of vengeance or punishment. It is recognition by the Court that at a given time a lawyer lacks sufficient character and moral fitness to retain his license. We think the evidence here is devoid of facts which call for a conclusion that respondent lacks character or moral fitness to continue the practice of law. He has not stolen, he has not been convicted of a serious crime, nor has he done any of the things that usually cause this Court to impose suspension or disbarment.

Even if the Court believes respondent's guilt has been established by a preponderance of the evidence, it is our view that a reprimand would be a sufficient sanction. Very possibly, the Court might consider suspension or probation of the suspension on condition of exemplary behavior. This is a sanction which has never been imposed by the Court but one possibly within its inherent power. Compare *Nicholson v. Board of Judicial Retirement and Removal,* Ky., 562 S.W. 2d 306. At any rate, this is a case where the writer has no hesitency in requesting that respondent be treated mercifully.

APPENDIX IX

KENTUCKY BAR ASSOCIATION

V. MICHAEL R. McMAHON

SUPREME COURT OF KENTUCKY

No. 78-SC-455-KB

(Petition for Rehearing, Page 10)

B. The Punishment Is Severe and Grossly Out of Proportion to What Occurred.

We cannot reconcile the degree of discipline with *Kentucky Bar Association v. Graves,* Ky., 556 S.W. 2d 890. We are also of the opinion, and this is our fault, that the Court did not give more weight to the defense of alcoholism which is set forth in KRS 222.011, Section 3, and this statute says:

> "'Alcoholism' means a medically diagnosable disease characterized by chronic, habitual or periodic consumption of alcoholic beverages resulting in the (a) substantial interference with an individual's social or economic functions in the community, or (b) the loss of powers of self-control with respect to the use of such beverages."

With the mitigating factors present and the aggravating factors absent, respondent is of the opinion that no suspension is justified and that his conduct warranted a public reprimand at the most. Respondent did not personally profit from this transaction and he acted honorably and ethically with his client when he confessed the fact that he had not filed the suit. The conduct here does not bring the Bench and Bar into disrepute but rather demonstrates respondent's integrity in facing up to a dereliction and to a disease and trying to do the right thing about it.

CERTIFICATE OF SERVICE

I, Leslie G. Whitmer, Counsel for the Kentucky Bar Association, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 2nd day of May, 1979, I served on the Honorable Burton Milward, Jr., 319 Kentucky Home Life Building, Louisville, Kentucky 40202, Attorney for Petitioner, a copy of this brief by mailing same, postage prepaid.

Leslie G. Whitmer

LESLIE G. WHITMER

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1534

MICHAEL R. McMAHON - - - - Petitioner

versus

KENTUCKY BAR ASSOCIATION - - Respondent

On Petition For Writ Of Certiorari
To The Supreme Court Of Kentucky

REPLY BRIEF BY PETITIONER

BURTON MILWARD, JR.
319 Kentucky Home Life Building
Louisville, Kentucky 40202
Counsel for Petitioner

May 8, 1979

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

INDEX

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

REPLY BRIEF BY PETITIONER

The Petitioner, MICHAEL R. McMAHON, respectfully submits this Reply Brief.

PURPOSE OF REPLY BRIEF

The purpose of this Reply Brief is to correct an error in the jurisdictional statement of the Petition and to reply to the Brief for Respondent in Opposition.

JURISDICTION

In the Petition filed in this proceeding, the jurisdictional statement invoked jurisdiction "under 28 U.S.C. §1254(1)." [Petition for a Writ of Certiorari

to the Supreme Court of Kentucky, p. 2.] This is erroneous, and jurisdiction in this proceeding is properly invoked under 28 U.S.C. §1257(3).

REPLY

In addition to responding to the Questions Presented on the merits, the Respondent has contended that the issues raised by the Petitioner were not before the court below as required by 28 U.S.C. §1257(3).

The fact is that the very issues now raised upon this Petition were the *only* defensive issues before the court below. The Petitioner's defense—at every stage of the disciplinary proceedings—was alcoholism. Further, the Petitioner specifically addressed the severity-of-punishment issue before the court below. *See,* for example, Petitioner's argument to the Supreme Court of Kentucky, ". . . the Punishment Imposed Was Too Severe," reproduced in the Appendix to the Brief for Respondent in Opposition, pp. 12-A-13-A. *See also,* for example, Petitioner's Petition for Rehearing to the Supreme Court of Kentucky, "The Punishment Is Severe and Grossly Out of Proportion to What Occurred," reproduced in the Appendix to the Brief for Respondent in Opposition, p. 14-A.

CONCLUSION

Because constitutional protections of due process and against cruel and unusual punishment yet exist to bar punishment for illness and punishment which serves no purpose, because Petitioner has overcome the disease which crippled him and caused the neglect involved, because Petitioner has voluntarily made full restitution of the claim involved, because Petitioner is now fit to continue in the practice of law, and because the punishment imposed by the court below is manifestly unjust in this case, it is respectfully submitted that a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Kentucky.

Respectfully submitted,

BURTON MILWARD, JR.
319 Kentucky Home Life Building
Louisville, Kentucky 40202
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of Petitioner's Reply Brief By Petitioner have been mailed, postage prepaid, this the 8 day of May, 1979, to:

Hon. Leslie G. Whitmer
Director, Kentucky Bar Association
Bush Building
403 Wapping Street
Frankfort, Kentucky 40601
Counsel for Respondent

All parties required to be served have been served.

Burton Milward, Jr.

BURTON MILWARD, JR.
Member of the Supreme Court Bar
319 Kentucky Home Life Building
Louisville, Kentucky 40202
(502) 587-8987
Counsel for Petitioner